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In the Supreme Court of the United States

OCTOBER TERM, 1982

HERMAN S. SOLEM, WARDEN, AND MARK V. MEIERHENRY, ATTORNEY GENERAL OF SOUTH DAKOTA, PETITIONERS

v.

JOHN BARTLETT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Act of May 29, 1908 (35 Stat. 460) diminished the Cheyenne River Indian Reservation so that the State of South Dakota (which has not assumed jurisdiction under Pub. L. 280) now enjoys criminal jurisdiction over offenses involving Indians occurring on non-Indian lands within the opened area.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Respondent John Bartlett, an enrolled member of the Cheyenne River Sioux Tribe, pleaded guilty in 1979 in a South Dakota state court to a charge of attempted rape. The crime took place on an alienated parcel of land in Eagle Butte, South Dakota, which lies within the portion of the original Cheyenne River Indian Reservation that was opened to settlement by the Act of May 29, 1908, ch. 218, 35 Stat. 460. Pet. App. A2-A3. After Bartlett's request for post-conviction relief was denied by the South Dakota court in which he had entered his plea (Pet. App. A2, n.1), he filed a petition for a writ of habeas corpus, pursuant to 28

U.S.C. 2254, in the United States District Court for the District of South Dakota. There, he contended that the crime was committed in "Indian country", as defined in 18 U.S.C. (Supp. V) 1151, and that, accordingly, exclusive jurisdiction to prosecute him rested with the Sioux Tribe or the federal government. In opposition, the State of South Dakota contended that the 1908 Act terminated the reservation status of the portion opened to sale to non-Indians and divested the Tribe and the United States of jurisdiction over alienated lands in that area. Pet. App. A2-A3.

2. The district court applied the rulings of the Court of Appeals for the Eighth Circuit in *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (8th Cir. 1973), and *United States* v. *Dupris*, 612 F.2d 319 (8th Cir. 1979), vacated and remanded, 446 U.S. 980 (1980), to the effect that the Cheyenne River Indian Reservation was not disestablished or diminished by the 1908 Act. Therefore, despite contrary decisions by the South Dakota Supreme Court,[1] the district court held that the State was precluded from exercising its criminal jurisdiction over Bartlett since the opened portion remained "Indian country" within the meaning of 18 U.S.C. (Supp. V) 1151. The court granted the writ of habeas corpus, but stayed the effect of its decision pending the outcome of any appeal. Pet. App. A1-A8, A96-A97.

3. The court of appeals, sitting en banc, affirmed (Pet. App. A9-A11), Judges McMillian and Arnold dissenting (Pet. App. A11-A12).[2] The court declined to overrule

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[1] *State* v. *Janis*, 317 N.W.2d 133 (S.D. 1982); *Stankey* v. *Waddell*, 256 N.W.2d 117 (S.D. 1977).

[2] The United States, the Cheyenne River Sioux Tribe, and the Standing Sioux Tribe participated as amici curiae in support of Bartlett. The Counties of Dewey, Corson and Ziebach, South Dakota, and Sioux County, North Dakota, participated as amici curiae in support of the State.

United States v. *Dupris, supra*, and found that *Dupris*, *United States* v. *Long Elk*, 565 F.2d 1032 (8th Cir. 1977), and *United States ex rel. Condon* v. *Erickson, supra*, were consistent with this Court's decisions in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977). Pet. A10-A11.

ARGUMENT

1. The only issue tendered by the petition is the continuing status as "Indian country" of a portion of one Indian Reservation in South Dakota. That question has been squarely decided against the claim of "diminishment" or "disestablishment" in at least three holdings of the Court of Appeals for the Eighth Circuit, *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (1973); *United States* v. *Dupris*, 612 F.2d 319 91979), and the present case. See also, *United States* v. *Fay*, 668 F.2d 375 (1981), affirming in part a criminal conviction under 18 U.S.C. 1153 in respect of offenses committed at Eagle Butte without discussion of the jurisdictional issue. The first of these decisions has been cited and quoted with approval in *Mattz* v. *Arnett*, 412 U.S. 481, 497 n.19, 505 (1973), a precedent since reaffirmed by this Court. See *DeCoteau* v. *District County Court*, 420 U.S. 425, 444, 447-449 (1975); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586-587 (1977). What is more, on two occasions, the Eighth Circuit has expressly revisited its seminal *Condon* decision in light of this Court's more recent *DeCoteau* and *Rosebud* rulings and the contrary holdings of the South Dakota Supreme Court and has determined to adhere to its conclusion. *E.g.*, *United States* v. *Long Elk*, 565 F.2d 1032, 1034-1040 & n.10 (1977); *United States* v. *Dupris, supra*, 612 F.2d at 321-323. And, now, after reconsidering the matter en banc, that court has firmly settled the question.

In this situation, there would normally be no occasion for further review. In *Mattz*, *DeCoteau* and *Rosebud*, this

Court announced the governing guidelines. The mere fact that portions of an Indian reservation have been opened for settlement "does not necessarily mean that the opened area has lost its reservation status." *Rosebud, supra*, 430 U.S. at 586-587. Disestablishment will be found only if such an intent is clear on the face of the statute or from surrounding circumstances and legislative history. *Ibid.* Here, we submit, the court of appeals faithfully applied the standards established by this Court and concluded that no diminishment of the Cheyenne River Reservation was intended by Congress—just as it correctly reached the opposite result in *Rosebud*.[3] Such a determination, essentially fact-bound, ordinarily does not warrant review here. See *City of Polson* v. *Salish and Kootenai Tribes*, No. 81-2406 (Nov. 1, 1982), slip op. 1-2 (Rehnquist, J., dissenting from denial of certiorari). See also the orders of this Court denying certiorari cited at Pet. 13.

2. To be sure, a complicating circumstance is presented by the conflicting decisions of the South Dakota Supreme Court. *Stankey* v. *Waddell*, 256 N.W.2d 117 (1977); *State* v. *Janis*, 317 N.W.2d 133 (1982). Thus far, that court has declined to accept the rulings of the federal appellate court

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[3]As the opinion below recited (Pet. App. A11), "*DeCoteau* and *Rosebud* were thoroughly analyzed by [the court of appeals] in *United States* v. *Dupris, supra*, and *United States* v. *Long Elk, supra*." We do not repeat that discussion here. Suffice it to say that the history of the "opening up" of the Cheyenne River Reservation is critically different from the situation in *DeCoteau* and *Rosebud* in at least the following respects: (1) the relevant legislation contains no language of "cession"; (2) there was no prior tribal agreement to cede the relevant area; (3) after opening, the federal government continued to exercise substantial authority over the opened portion of the Reservation; (4) that area has remained primarily Indian in population, embracing the Indian community of Eagle Butte where the Bureau of Indian Affairs Agency for the Tribe and seat of the tribal government are located; and (5) approximately half the land in the opened area is held in trust for the Tribe or its members.

as settling this issue of federal law. But it does not follow that this Court must now intervene to resolve the disagreement.

Significantly, the most recent decision of the South Dakota Supreme Court, in *Janis*, was rendered after this Court vacated, as probably moot, the Eighth Circuit's ruling in *Dupris*. See 446 U.S. 980 (1979).[4] It appears that the State court read this action as removing an otherwise controlling precedent. See 317 N.W.2d at 137-138. That situation is of course altered, now that the federal appellate court, sitting en banc, has again re-affirmed the status of the opened area of the Cheyenne River Reservation. If the present decision stands, it may well be that the South Dakota court will acquiesce in this declaration of federal law. Should the State court persist in its own view, it will be time enough for this Court to consider the matter.

In the meanwhile, there is no urgent impasse. As the Attorney General of South Dakota apparently recognized in the proceedings before the court below, State prosecution of an offense within the scope of Sections 1152 or 1153 of the Federal Criminal Code occurring on the opened area of the Cheyenne River Reservation is effectively barred by the present decision. See Br. in Opp. 6. Presumably, the availability of habeas corpus relief for any person convicted in the state courts will deter any such vain attempt.

Moreover, given only six reported cases in the last decade,[5] it does not appear that the issue of criminal jurisdiction within the contested area presents an acute problem.

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[4]On remand, the case was ultimately mooted by the court of appeals' direction to the district court to grant the government's motion to dismiss the information against Dupris. 664 F.2d 169 (1981).

[5]These are: the previously cited decisions in *Condon*, *Fay*, *Dupris*, and *Janis*, the instant case, and *United States* v. *Mound*, 477 F. Supp. 156 (D.S.D. 1979). The district court decision entitled *United States* v. *Juvenile*, 453 F. Supp. 1171 (D.S.D. 1978), is the same case that the court of appeals reversed *sub nom. United States* v. *Dupris*.

No doubt, this is attributable in part to the sparse population of the region, which is largely Indian. So, also, substantial portions of the area opened up by the 1908 Act were never alienated and were restored to tribal ownership after 1934 (see Br. in Opp. 3; Br. of Dewey Co. *et al.* 5-6 & n.4), and, accordingly, are concededly beyond State criminal jurisdiction. *Ibid.* Of course, Indian allotments within the opened area that remain in trust or restricted status are likewise "Indian country" not subject to State criminal jurisdiction, regardless whether the Reservation boundaries embrace them. 18 U.S.C. (Supp. V) 1151(c). And the same is true of any "dependent Indian community", 18 U.S.C. (Supp. V) 1151(b), a status recognized for one area of Eagle Butte. *United States* v. *Mound, supra.* The upshot is that there is no jurisdictional question, for criminal law purposes at least, as to about the area of the opened portion which today constitutes "Indian country," no matter how the "diminishment" issue is resolved.

There are, in principle, other potential consequences of reservation status, primarily as it affects State authority over Indians on fee lands within the opened area.[6] But no

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[6]Reservation status normally does not affect state taxing or regulatory jurisdiction over non-Indians on alienated lands. See *Utah & N. Ry.* v. *Fisher*, 116 U.S. 28 (1885); *Montana* v. *United States*, 450 U.S. 544 (1981). And the state retains the same criminal jurisdiction of offenses involving only non-Indians whether the situs is inside or outside an Indian Reservation. *United States* v. *McBratney*, 104 U.S. 621 (1882). Nor does the Tribe enjoy jurisdiction over such non-Indians, even within Reservation boundaries, unless they are engaged in commercial dealings with tribal members or their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana* v. *United States, supra*, 450 U.S. at 565-566. See, also *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978). So far as we are aware, the Cheyenne River Tribe has not sought to exercise any jurisdiction over non-Indians within the opened area, except in respect of sales taxes collected under a cooperative agreement with the State. See note 8, *infra*.

live controversy is presented in these contexts. Compare *DeCoteau* v. *District County Court, supra.* The unique facts of the only reported decision dealing with the diminishment question in a non-criminal setting, *Stankey* v. *Waddell, supra*, suggest no recurring issue of general importance.[7] Any further dispute, should it arise, can be addressed, if need be by this Court. There is no reason to anticipate that eventuality. After all, Public Law 280, as amended in 1968, offers an opportunity for the State and the Tribe amicably to resolve any jurisdictional questions (see 25 U.S.C. 1321(a), 1322(a)), and it is not inconceivable that an agreement, formal or informal, can be reached if and when real problems develop.[8]

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[7]It will presumably be a rare case, indeed, in which a member of another related Tribe, the widow of a non-Indian, residing on an alienated parcel, seeks exemption from personal property taxes previously assessed against her late husband. See 256 N.W.2d at 118 & n.1. It is not altogether clear that Mrs. Stankey was entitled to immunity from State taxation even if the non-Indian parcel on which her property was located were deemed part of the Reservation. But, at all events, it is unusual in the case of the Cheyenne River Reservation to find an Indian living on alienated land.

[8]For instance, we are advised that, since 1976, the State and the Tribe have operated under an agreement in respect of sale taxes, which are collected by the State on all sales throughout the original area of the Reservation, regardless of land status and the race of buyer and seller, and then remitted in part to the Tribe according to an agreed formula. That practical accommodation effectively moots, for this purpose, otherwise complex jurisdictional issues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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